Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KEVIN O'ROURKE

Petitioner

—V.—

SMITHSONIAN INSTITUTION PRESS and THE SMITHSONIAN INSTITUTION

Respondents

PETITION FOR WRIT OF CERTIORARI

KEVIN O'ROURKE , Attorney Pro Se
19 Buckingham Road
Rockville Centre, New York 11570
(516) 678-6977

Attorney for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Did the Second Circuit Court of Appeals err in concluding that the Federal District Court does not have jurisdiction of copyright cases against the Smithsonian Institution under 28 U.S.C. Sc. 1498(b)?

2. Did the Second Circuit Court of Appeals err by ruling that the links between the Smithsonian Institution and the Government was sufficient to include the Smithsonian Institution in the phrase the "United States" in 28 U.S.C. Sc. 1498(b)?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties to the proceeding.

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I JUDGE KIMBA WOOD'S DECISION OF THE FEDERAL DISTRICT COURT, DATED NOVEMBER 14, 2003

II DECISION OF UNITED STATES COURT OF APPEAL, DATED FEBRUARY 16, 2005

TABLE OF AUTHORITIES

1. Dong v Smithsonian Institution , 125 F.3d 877-883, (D.C. Cir.1997), cert. Denied , 524 U.S. 922 (1998)

2. Cotton v Heyman, 63 F.3d 1115 (D.C. Cir. 1995).

OPINIONS ENTERED IN THE CASE

Judge Kimba Wood's decision of the Federal District Court dated November 14, 2003

Decision of the United States Court of Appeals for the Second Circuit dated February 16, 2005

ACTS OF CONGRESS INVOLVED

1. 17 U.S.C. Sc. 101 Et seq. (Copyright Act)
2. 28 U.S.C. 1498(b) The Judiciary Act
3. 20 U.S.C. Sc. 42 The Education law
4. 20 U.S.C. Sc. 54 The Education law
5. 31 U.S.C. Sc.1344g(2) The passenger Carrier Act
6. 5 U.S.C. Appendix 3 Sc. 7103 (Sc.8g(a)(2)) Inspector General Act
7. 5 U.S.C. Sc 7103 (a)(3) 1978 and 1998 Revised of Labor-Management Relations Law
8. 22 U.S.C. Sections 3643(b), 3665,3782 & 3782(d) Panama Canal Act.

28 U.S.C. Sc. 1498(b) says in part "(b) Hereafter, Whenever the copyright in any work protected under the Copyright Laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement...That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate DEPARTMENT OR AGENCY OF THE GOVERNMENT (Emphasis added), as the case may be, is authorized to enter into an agreement...No recovery shall be had..between the date or receipt of a written claim for compensation by the DEPARTMENT OR AGENCY OF THE GOVERNMENT (Emphasis added) or corporation owned or controlled by the United States, as the case may be..."

BASIS OF JURISDICTION

Action is brought pursuant to Federal Copyright Act of 1976, as amended, 17 U.S.C. Sc.101, et seq. (Copyright Act) against the Smithsonian Institution in the Federal District Court. The United States Court of Appeals for the Second Circuit on February 15, 2005 affirmed the dismissal of the case by the District Courtsaying that jurisdiction lies exclusively with the United States Court of Federal Claims. Petitioner contends that the Smithsonian is not included in the phrase the "United States" for the purpose of 28 U.S.C. Sc. 1498(b) and that therefore the District Courts have jurisdiction. This Court has jurisdiction to review the decision under 28 U.S.C. Sc. 1254(1)

STATEMENT OF THE CASE

The Plaintiff is the author and copyright owner of the original book , Currier and Ives: The Irish and America. The Defendant, Smithsonian Institution Press, published for profit a book by a private author entitled Currier and Ives, America Imagined, which violated Plaintiff/Petitioner's copyright by using the same text in numerous places as the plaintiff/ Petitioner's book.

Pursuant to a private bequest by Mr James Smithson, Congress in 1846 passed an act constituting the Smithsonian Institution as an "ESTABLISHMENT" for the increase and diffusion of knowledge among men" (The defendants have submitted an affidavit calling the Smithsonian a "TRUST INSTRUMENTALITY OF THE UNITED STATES"). The act indicates that the money from the bequest would be lent to the United States Treasury at 6% and that the interest from the trust fund be paid to the Smithsonian twice a year for erection of buildings, maintenance and expenses. Congress revised this section in 1982 but kept the fund intact and allocated funds solely from the interest from time to time (20 U.S.C. Sc.54). Besides these funds from Congress the Smithsonian receives approximately a third of their expenses from membership, publications and private donations.

The act further stipulated that the Smithsonian be run by a Board of Regents Consisting of Government and non-Government employees. Today as per 20 U.S.C. Sc. 42 the Board of Regents has a private-citizen majority (9 out of a total of 17).

REASONS FOR GRANTING THE PETITION

I A PLAIN READING OF THE STATUTE DOES NOT INCLUDE THE SMITHSONIAN INSTITUTION.

In interpreting 28U.S.C. 1498(b) defendants have relied solely on the phrase "The United States" conceding that the Smithsonian cannot be included in any other entity mentioned in the Statue such as Government Corporation or Government controlled corporation. Furthermore there

are two instances in the Statute where instead of using the term "The United States" the statute refers to "DEPARTMENT OR AGENCY OF THE GOVERNMENT". Logically this defines the meaning of the phrase "the United States". It would appear that for defendants to succeed in their argument that the Smithsonian is included in the phrase "The United States" the Smithsonian would have to be either a DEPARTMENT or AGENCY of the Government. The Smithsonian does not claim it is an AGENCY of the Government because it does not want the responsibilities and because in two previous cases involving The Freedom of Information Act (Cotton v Heyman, 63 F.3d 1115) and the Privacy Act it claimed it was not an AGENCY of the Government. It is clearly not a DEPARTMENT of the Government. If the Smithsonian has no place to fit itself in the Statute, the Statute has to be interpreted creatively to include it. But there is no mention of "TRUST INSTRUMENTALITIES OR INDEPENDENT ADMINISTRATIONS OF THE GOVERNMENT" under which titles it might have been included. Congress has shown that it understands the nature of the Smithsonian by naming it in acts as an agency when it is appropriate to do so. For example in the Passenger Carrier Act, the Inspector General Act, the Panama Canal Act and Labor Management laws Congress specifically lists the Smithsonian as an agency (See "Acts of Congress" in Table of Contents). If the Smithsonian is included in the phrase " The United States" one has to ask what else is included? Is the National Academy of Science included? By including the Smithsonian in the phrase "The United States" the Court is in effect making law which is the prerogative of Congress. Writ of Certiorari should be granted and the petitioner should prevail.

II THE SECOND CIRCUIT'S DECISION IS BASED ON AN ARGUMENT (THE LINKS BETWEEN THE SMITHSONIAN INSTITUTION AND THE GOVERNMENT) THAT HAS BEEN REJECTED BY A DISTRICT OF COLUMBIA CIRCUIT DECISION USING THE SAME ARGUMENT.

The Decision of the Court of Appeals in this case does not rely on precedent and says so. There is none specific to this Statute. However there is precedent with respect to the arguments used to justify the decision in this case which is contrary to the arguments used in another case decided by the Federal Court of Appeals for the District of Columbia Circuit. That is the case involving The Privacy Act, Dong v The Smithsonian

Institution, 125 F.3d 877,883 (D.C.Cir. 1997, cert.denied, 524U.S. 922 (1998) which held that the Smithsonian Institution was not an AGENCY of the Government.

The Second Circuit Court of Appeals in this case advises that its decision is based on the following:

"A. The Purpose of Sc. 1498(b)" and
"B. The Establishment and Operation of the Smithsonian"

It concedes that "Neither Sc. 1498(b) itself nor its legislative history EXPRESSLY (Emphasis added) mentions the Smithsonian." Since this is conceded anything else said about Sc. 1498(b) with respect to The Smithsonian Institution has to be creative.

The Decision sums up its argument as follows:

> "In sum, Congress accepted the Smithson bequest to the United States and promised to establish the Smithsonian for purposes of the increase and dissemination of knowledge; the Smithsonian thus engages in the publication of scholarly works; and Congress authorizes appropriations for most of the Smithsonian's operations, including its publishing operation. The persons responsible for the Smithsonian's operations are either United States officials of the highest rank,'ex officio, or persons appointed by joint resolution of Congress; and most members of the Smithsonian workforce are employees of the United States government. In litigation, the Smithsonian is represented by government attorneys; and judgments against the Smithsonian are paid from the United States Judgment Fund, with funds appropriated by Congress. In light of all these factors, we conclude that Congress intended "the United States" in Sc. 1498(b) to encompass the Smithsonian."

The decision discusses a number of District Court cases that it does not find" "...particularly helpful, as they involve definitions that do not parallel the term" "the United States" in Sc. 1498(b). (It seemed to have missed the part in Sc. 1498(b) that substitutes ""DEPARTMENTS AND AGENCIES OF THE GOVERNMENT" for the phrase "the United States). It does mention Johnson v Smithsonian Institution, 189 F3d at 189 involving the Federal Tort

Claims Act which found that the Smithsonian to be a Federal agency because the FTCA "includes ...independent establishments of the United States". We noted above that INDEPENDENT ESTABLISHMENTS OF THE UNITED STATES ARE NOT MENTIONED IN Sc. 1498(b).but could have been and clearly the Congress was familiar with the concept to have included it in the FTCA. It concludes its argument by conceding the precedents are not there "EVEN SO WE PLACE LITTLE, IF ANY (Emphasis added), reliance on cases decided under other statutes. We base our conclusion that Sc. 1498(b) governs suits against the Smithsonian for copyright infringement on the considerations discussed in Parts II.A. and B. above."

The arguments above are contradicted in the Court of Appeals District of Columbia Circuit Case Dong v Smithsonian which using the same arguments came to a different conclusion and held that

> " The Smithsonian was not an agency of the Government (Conceded that it was a different statute-Privacy Act). But the core issue is the same-the relationship of the Smithsonian to the United States. Dong held "The Smithsonian Institution was not an agency subject to the Privacy Act; Smithsonian was not a government controlled corporation or establishment of the Executive Branch, and although Smithsonian received substantial Federal funds, any public authority it exercised, including limited police powers, was entirely ancillary to its cultural and educational mission".

The District of Columbia Circuit Court of Appeals in Dong further held that the Smithsonian's links to the Government were not persuasive to make it an agency of the Government (completely rejecting the arguments used in the decision here).
These links include according to Dong:

A. 70%OF ITS EMPLOYEES ARE CONSIDERED FEDERAL CIVIL SERVICE EMPLOYEES.
B. EXTENSIVE FEDERAL FUNDING.
C. FEDERAL IMMUNITY FROM TAXES AND LIBEL ACTIONS.
D. REPRESENTATION IN COURT BY THE DEPARTMENT OF JUSTICE.
E. ITS REGENTS ARE FEDERAL OFFICERS OR ARE SELECTED BY FEDERAL OFFICIALS.

It goes on to say "...Plaintiff's litany of links between the Smithsonian and the federal government is" "like Homer's catalogue of ships- exhaustive but quite beside the point"".
The Second Circuit is awed by the powerful officials on the Board of Regents. The District of Columbia Circuit was not and seemingly did not care if all the Regents were officials of the government. In fact the powerful Congress of the United States made sure that PRIVATE CITIZENS could outvote the powerful government members of the Board by giving it a private- citizen Majority of 9 out of 17 members.(20 U.S.C. Sc. 41). ' WE ARE INDEPENDENT OF THE GOVERNMENT' says the Smithsonian Institution in its 'Official Guide to the Smithsonian".

The Court of Appeals for the District of Columbia Circuit in Dong made sure its position was clear with numerous points including the following:

> "THE SMITHSONIAN IS A CULTURAL AND RESEARCH INSTITUTION ESTABLISHED IN 1846 PURSUANT TO A PRIVATE BEQUEST TO THE UNITED STATES. IT IS NO DIFFERENT FROM A PRIVATE RESEARCH UNIVERSITY WHICH RECEIVES FEDERAL FUNDS AND ENJOYS SOME CONTROL OVER THEIR USE"
> "IT DOES NOT MAKE BINDING RULES OF GENERAL APPLICATION OR DETERMINE RIGHTS AND DUTIES THROUGH ADJUDICATION. IT ISSUES NO ORDERS AND PERFORMS NO REGULATORY FUNCTIONS"
> "TO THE EXTENT THAT THE SMITHSONIAN EXERCISES ANYTHING APPROACHING PUBLIC AUTHORITY THAT AUTHORITY APPEARS TO BE ENTIRELY ANCILLARY TO ITS CULTURAL AND EDUCATIONAL MISSION"
> "THERE IS NO EVIDENCE THAT THE SECRETARY OF THE SMITHSONIAN ANSWERS TO THE PRESIDENT OR THAT THE INSTITUTION ADMINISTERS FEDERAL STATUTES, PROSECUTES OFFENSES, PROMULGATES RULES AND REGULATIONS (OTHER THAN ITS OWN BUILDINGS AND GROUNDS), OR ENGAGES IN ANY TYPICAL EXECUTIVE ACTIVITY"

Justice Kimba Wood in the District Court Decision relied on three arguments. Plain language of Sc. 1498(b), other lower court cases and

the "Litany of Links" argument. The Court of Appeals must have listened to my oral argument that in plain language the Smithsonian is not in Sc. 1489(b) as it did not repeat the argument in its decision. We have already noted that it does not rely on any other cases for its decision here which essentially leaves the Court of Appeals decision with the "Litany of Links" argument, augmented by its own research on the Internet. The Litany argument as we noted above had already been used to the contrary in the District of Columbia Circuit case. The Supreme Court has recognized this and set the precedent by failing to grant Certiorari in that case.

III THE RELATIONSHIP BETWEEN THE SMITHSONIAN INSTITUTION AND THE GOVERNMENT IS AN IMPORTANT MATTER.

Clarification of the relationship between the Smithsonian Institution and the Government is obviously important for this matter as well as many others due to conflicting decisions. It is important that writers in all parts of the country have access to the courts. Any writer young or old other than a select few would never have been able to afford to mount a challenge to a powerful institution that appropriated their work without being a lawyer themselves.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant certiorari review.

Respectfully submitted,

Kevin O'Rourke, Attorney Pro Se
19 Buckingham Road
Rockville Centre, New York 11570-2219
Phone 516 678-6977